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**TESTIMONY OF THE NATIONAL ASSOCIATION OF
REALTORS®
BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON
COURTS AND INTELLECTUAL PROPERTY
ON H.R. 354, THE “COLLECTIONS OF INFORMATION
ANTIPIRACY ACT”**

**PRESENTED BY TERRY MCDERMOTT
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EXECUTIVE VICE PRESIDENT
NATIONAL ASSOCIATION OF REALTORS
MARCH 18, 1999**

Good Morning. My name is Terry McDermott. I am the Executive Vice President of the National Association of REALTORS® (NAR). We represent over 730,000 REALTORS® involved in all aspects of the real estate industry nationwide. I would like to speak to you today about the “Collections of Information Antipiracy Act.” First of all, I would like to thank Chairman Coble and Congressman Berman for their introduction of H.R. 354, as well as those members of the subcommittee who have cosponsored the bill. I want to assure you of NAR’s commitment to support its passage this year.

Real estate is information sensitive. As reliance on sources of information increases, so does their value. REALTORS® have long used compilations of data relating to property listings collected by the Multiple Listing Services (MLS) located throughout the United States. In addition, NAR offers information on property listings to the public through its REALTOR.COM website. These services and long time practices are threatened by entities who pirate this information and utilize it to the detriment of REALTORS®. H.R. 354 would prohibit this harmful practice.

REALTORS® believe in and welcome healthy competition. We do not believe that the ability to press a button and copy listings to another’s site is healthy. It is, in fact, unhealthy for both our profession and the consumer. REALTOR.COM gives the consumer a huge database of information useful to their homebuying and selling process. There are many competing sites operating today which utilize legal and fair methods to obtain their listings.

REALTORS® abide by a strict Code of Ethics, which provides a higher standard of care to consumers and punishment for wrongdoing. NAR believes that it is the right of the REALTOR® and the homeowner to decide where their listing should appear. It is on this relationship that the whole process is based. REALTORS® are proud of the trust they earn from consumers as a result. H.R. 354 would support homeowners and REALTORS® by prohibiting unscrupulous parties from seizing the fruits of this relationship, and utilizing them in an unfair and inappropriate way.

NEED FOR ADDITIONAL PROTECTION

REALTORS® invest substantial resources in obtaining, developing, and maintaining real estate listings. Indeed, these listings are the essence of the business of real estate. H.R. 354 would prohibit a competitor from extracting a substantial number of those listings and using them in a manner which harms REALTORS®. The bill would provide a complement to copyright, and represents a minimalist approach to the prevention of unfair duplication and marketing.

MLS information is pirated for many purposes. Listing information is copied to a competitor's site as their own. They may sell advertising banners and may demand commission splits from listing agents for referrals of buyers. Non-real estate entities may want this information for business referral purposes. H.R. 354 would prohibit the misappropriation of REALTORS® valuable commercial collections of real estate property listings by pirates who would grab them, repackage them, and market them to the detriment of REALTORS®.

Consumers can also be effected by this misappropriation. A licensee has a fiduciary duty of care to the home seller or buyer. They are obligated to follow the laws and regulations of their jurisdictions. A pirating entity has no contractual or legal obligation to the homeowner or the consumer at all. There would be no protection of their identity or address. A pirated listing may not be subject to regulation, and thus the consumer would be without protection. **So, although the bill is intended to protect a compiler's commercial interest, it may also provide consumer protections in the case of real estate listings.**

While REALTORS® will continue to rely on federal copyright law, state contract law, and underlying licensing agreements to protect our enormous investment in real estate listings, we feel that the gaps in this protection can best be filled by a new federal statute which will complement copyright law.

H.R. 354, the "Collections of Information Antipiracy Act," will prohibit the misappropriation of our valuable listing data in a balanced and fair approach which maintains and reinforces existing protections for research and educational uses of information. In addition, the bill has been strengthened in the area of the "fair use doctrine" to make clear that the new protections under this statute would not effect that doctrine.

Armed with the certainty that H.R. 354 would provide, REALTORS® could be expected to maintain the most comprehensive real estate site in the world. This bill will ensure the value that a real estate listing provides to the public. It will promote the continued investment and upgrading of internet-based real estate sites and increased access to the consumer. In short, the bill will serve to broaden the consumers' ability to access information by protecting the collectors' investment in compiling that information.

BACKGROUND

Multiple Listing Services (MLS)

The multiple listing service is one of the most valuable sources of information in the real estate industry. The compilation of data in an MLS is a valuable asset that needs to be recognized as such and protected.

A multiple listing service is a system for the orderly correlation and dissemination of information about real property listed for sale with real estate agents who participate in the system. An MLS also allows participants to make offers to other participants to "cooperate" in the sale of a property. Typically, these offers of cooperation consist of a listing broker's offer to compensate another agent if the latter procures a ready, willing, and able buyer for the property.

MLS's are quite pro-competitive. Real estate agents who participate in an MLS are not limited to marketing the properties of sellers who have hired them to sell their properties. Such agents can seek to sell, and earn a fee on the sale of, properties listed with other real estate agents. Further, with many MLS's placing their listings on websites, such as REALTOR.COM, a prospective home purchaser can easily access information about a wide variety of properties for sale rather than just those listed with a particular agent with whom the purchaser may be working. Property sellers also benefit from wider exposure of their properties to potential buyers than would be possible without the MLS. Thus, the system serves to benefit sellers, buyers, and real estate agents alike.

In order to prevent dissemination of MLS information by participants to unauthorized persons, MLS's claim copyright protection for the MLS database. They also adopt rules which limit the extent to which MLS participants can use and distribute MLS information. Limitation of dissemination of MLS information is necessary to shield property sellers from direct inquiries about the property and from bombardment by solicitations for a variety of products and services attendant to real estate transactions, such as moving companies or home inspectors.

Today approximately 900 multiple listing services operate nationwide. The first multiple listing service was set up in 1887 by brokers in San Diego, California, though it wasn't called that at the time. At approximately the same time, an MLS

started in Cincinnati, Ohio. In 1907, a year before the National Association of REALTORS® was founded, the term *multiple listing service* was first used.

In 1968, the Long Island Board of REALTORS® made one of the first attempts at a computerized MLS. It failed due to the expensive and cumbersome equipment. In 1972, the Baltimore Board of REALTORS® instituted a centralized, computerized system for compiling MLS information. Starting as paper listings copied into binders, multiple listing services have developed into sophisticated electronic databases utilized nationwide for instantaneous dissemination and viewing by the real estate industry.

REALTOR.COM

REALTOR.COM is an effort to bring this sort of instant and wide variety of listings to the public. Our website contains over 1.2 million homes for sale. Each listing can be brought up by community, price, size and several other factors which the consumer chooses. Most listings contain photographs of the property. This site provides the consumer with the breadth of information desirable to assist in the home purchase. Last month, over 6 million consumers visited REALTOR.COM, and 11.5 million home searches were conducted. These results are clear evidence of the viability and success of real estate web sites.

Both REALTOR.COM and MLS's are services which require constant maintenance and updating. They are expensive to maintain. Listings which become stale and outdated are useless to both the consumer and the REALTOR®. State real estate regulations often require the listings to remain up to date. Thus the information contained on these sites is quite valuable to many different parties. The temptation to pirate this information has already been too great for some to avoid.

CASE SUMMARIES

Although legal actions under copyright law have been successful to date, they were based on the wholesale copying and use of real estate listings. Courts held that the inclusion of purely descriptive terms and abbreviations caused the works to

have the requisite “creativity” to obtain copyright protection. REALTOR.COM and other internet real estate sites have rendered most of the historical abbreviations extinct. In addition, with the focus and publicity that these legislative efforts have given this issue, smart pirates may be emboldened to attempt the misappropriation of partial listing information, sticking to the facts. This uncertainty is exactly what H.R. 354 would address.

In Montgomery County Association of REALTORS® (MCAR) v. Realty Photo Master, 878 F. Supp. 804 (D. Md. 1995), *aff’d*, 91 F.3d 132, 1996 WL 412584 (4th Cir. 1996) (Unpublished Disposition), the defendants copied the MLS database, added photos of the listed properties, and sold the resulting product.

Like many other MLS’s, MCAR’s system consisted of a computerized database containing information about the various properties for sale listed with MLS participants. In 1988, RPM developed and began offering to MLS participants a software system which digitized and downloaded, to a real estate agent’s personal computer, photographs of homes that were offered for sale. In order to identify and photograph properties listed for sale in the system, RPM needed to gain access to the MCAR MLS. RPM persuaded an MLS participant to provide such access, and was then able to integrate its electronic photo display and distribution service. RPM then sold its database of computerized photos of homes to several MLS participants. RPM also sold software which allowed participants to simultaneously access the MLS-provided information about the home (such as the features and price of the property, the listing broker’s identity and the terms of cooperation offered by the listing broker) and the RPM-provided photographic images of the home.

Upon discovering that RPM had access to the MLS database, MCAR sued RPM alleging that RPM’s use of its database constituted copyright infringement. The district court held that the computerized MLS database was copyrightable and that the copyright and copyright registration secured by MCAR were valid. The court rejected RPM’s claim that the MLS database was a mere collection of simple facts about the properties listed for sale. RPM claimed that like the white pages telephone directory in Feist Publications, Inc. v. Rural Tel. Ser. Co., 499 U.S. 340 (1991), the MLS should not be entitled to copyright protection. However, the district court held that the MLS database possessed the “minimal degree of creativity” required by Feist. In particular, the court pointed to the “marketing puffery” in the property listings (“elegant updated home, close to DC lines, gorgeous private backyard, lovely sunroom off LR”) and the “unique and elaborate system of abbreviations” employed by MCAR in the database. Thus, the court held that inclusion of factual data about the homes listed (address, style,

age, floor plan, price) did not negate the copyright protection to be afforded the original presentation and arrangement of the information.

The district court's conclusion was consistent with the result in another post-Feist MLS-copyright case, **San Fernando Valley Board of REALTORS®, Inc. v. Mayflower Transit, Inc.**, No. CV 91-5872-WJR (Kx) (C.D. Cal. 1993), where the court held that the manner in which listings were selected for inclusion in the Board's MLS database, and the information about each listing which was included, made the MLS database entitled to copyright protection and copyrighted.

Significantly, the district court did not reach the question of whether RPM violated MCAR's copyright. Although RPM conceded that it downloaded the MLS database into its computer, it gained access to the database through an agreement with an MLS participant. The court noted that the rules applicable to MLS participants authorized them to disclose MLS data to "persons essential to the conduct of the participant's business"; thus, an issue was raised as to whether RPM's downloading was or was not authorized. A finding that there was such authorization would, of course, preclude copyright infringement liability.

This ruling was unfortunate because the matter of infringement was at least as significant as the question of copyrightability of the MLS compilation. **While unauthorized wholesale, intact electronic reproduction of the entire MLS database would almost certainly constitute prohibited copying, it was less clear whether more limited reproduction of only certain aspects or items of information in the database would constitute copying prohibited by the Copyright Act. This uncertainty works against associations with copyrighted databases.**

The Collections of Information Antipiracy Act would address the uncertainty created by the judicial decisions. It would create clear guidelines on what constitutes unfair duplication of compilations of information, and it would provide appropriate remedies for wrongdoing. In conclusion, the National Association of REALTORS® once again thanks the sponsors of H.R. 354, and pledges its support for early passage and enactment of the bill into law.

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